No. 12

In the Supreme Court of the United States

October Term, 1948.

VIRGIL T. BRINEGAR, *Petitioner,*

vs.

THE UNITED STATES OF AMERICA.

On Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

MOTION TO STAY MANDATE
and
PETITION FOR REHEARING.

LESLIE L. CONNER,
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CASE CITED.

IN THE SUPREME COURT OF THE UNITED STATES.

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VIRGIL T. BRINEGAR, *Petitioner,*

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THE UNITED STATES OF AMERICA.

MOTION TO STAY MANDATE.

To the Honorable, The Supreme Court of the United States:

Comes now the petitioner, Virgil T. Brinegar, by his attorneys of record and respectfully moves the Court to stay the issuance of its mandate in this cause pending the determination of the Petition for Rehearing which is being filed herein simultaneously with this motion and in support thereof petitioner respectfully shows the Court:

I.

On June 27, 1949, this Court by its opinion in this cause on said date entered affirmed the judgment of the Circuit Court of Appeals of the Tenth Circuit, sustaining the conviction of your petitioner in the District Court of the United States for the Northern District of Oklahoma and the imposition of a fine of $100 and a sentence of imprisonment for a period of 30 days.

II.

That petitioner has prepared and is filing in due time, pursuant to Rule 33 of this Court, his Petition for Rehear-

ing herein. Petitioner states that said Petition for Rehearing is being filed in absolute good faith and not for the purpose of any delay, and that he sincerely believes the Court will favorably consider said petition.

IV.

Petitioner states that unless this Court enters an order staying the mandate herein to the Circuit Court of Appeals for the Tenth Circuit that the mandate herein will be issued on July 22, 1949, and that pursuant thereto the Circuit Court of Appeals will issue its mandate to the District Court and petitioner will be required to serve the punishment heretofore imposed upon him before this Court will have had time to act upon said Petition for Rehearing. That this would result in severe injustice and irreparable injury to petitioner if rehearing be granted. That the best interests of justice will be served if the mandate be stayed pending the determination of the Petition for Rehearing.

Wherefore, petitioner respectfully prays that this Court forthwith enter its order staying the issuance of its mandate in this cause pending the determination of the Petition for Rehearing.

LESLIE L. CONNER,
Oklahoma City, Oklahoma,
IRVINE E. UNGERMAN,
625 Wright Building,
Tulsa, Oklahoma,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL.

We hereby certify that the foregoing Motion to Stay Mandate in the above cause is presented to this Court in good faith and not for purpose of delay.

LESLIE L. CONNER,
IRVINE E. UNGERMAN,
Attorneys for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1948.

No. 12.

VIRGIL T. BRINEGAR, *Petitioner,*

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR REHEARING.

To the Honorable, The Supreme Court of the United States:

Comes now Virgil T. Brinegar, petitioner, and respectfully petitions the Court to grant him a rehearing in this cause and in support thereof respectfully submits the following reasons and memorandum:

I.

Because the Court in its opinion, we respectfully submit, has inadvertently gone beyond the Record in the case; has in effect retried the matter *de novo*, and has bottomed its conclusion which deprives this petitioner of his freedom and liberty on the basis of an assumption of a material evidentiary fact which was not only held by the trial court to be undisputed to the contrary, but concerning which, because of such ruling defendant was denied the right of cross-examination of government witnesses, and the opportunity to disprove the assumption here indulged. Petitioner is thereby denied a fair and impartial trial.

II.

Because the Court in its opinion, in sustaining the conviction of Brinegar, we respectfully submit, has enlarged the holding of the *Carroll* case in such manner as in actual practice gravely to endanger the freedom and security of the American citizen from unlawful search and seizure guaranteed by the Fourth Amendment and to deny him the right of effective judicial review of the action of overzealous police agents of the Federal Government.

III.

Because the opinion has placed the stamp of this Court's approval on the practice of Federal Agents lying in ambush or in wait on all roads leading into Oklahoma (Oklahoma has no roads leading into the state which do not come from "wet" states) and indiscriminately stopping to search for evidence of violation of law all automobiles which they suspicion of carrying liquor or which are driven by persons whom they know or suspect are transporters of whiskey. Such a test, we respectfully submit, makes meaningless the check of "probable cause."

IV.

Because the opinion of the Court will, we respectfully submit, create confusion as to the law of search and seizure and the protection to be afforded by the Constitutional Amendment. This opinion, we humbly submit, abdicates the principle upon which we believe rests the basic concept of individual liberty in a democracy: That judicial sanction or constitutional sanction subject to judicial review is a condition precedent to the lawful exercise of power by Federal police agents.

V.

Because the principle enunciated by the Court's opinion, if permitted to stand, we respectfully submit, repudiates long established precedent of this Court and on the basis of expediency renders impotent and sterile those fundamental safeguards which, in earlier day were by the forefathers established as and by this Court declared to be, "the very essence of constitutional liberty and security."

VI.

Because the principles and the law announced by the opinion of the Court are, we respectfully submit, of such fundamental and of such great importance to the citizens of the United States, as well as to the petitioner, that the opportunity should be granted petitioner to make a full and complete record and the question on the basis of all the evidence adduced should be re-examined.

We believe sincerely that this case is and will be a landmark case. We believe that the principle which it announces, as applied to the facts, ranges far beyond, and its implications dwarf to practical insignificance the conviction or failure to convict Virgil T. Brinegar of a misdemeanor. We urge that the result obtained is fraught with the deepest public significance; only time will tell whether in fact the tyranny of which we are honestly apprehensive will in fact arise. The great teachings of the forefathers distilled into the Fourth Amendment out of the tyranny that was Britain should be indelibly impressed upon our conscience by the experiences of other peoples under the dictatorial tyrannies of the present day. It can happen here. If such result is possible under the opinion it should not be permitted to stand. Law enforcement and the conviction of those guilty of crime is admittedly essential to the well-

being and order of society. The conviction of those guilty of crime by methods beyond the pale of the law, however, is the abrogation of law and order.

We respectfully submit that the petition for rehearing be granted, and so we respectfully pray.

LESLIE L. CONNER,
IRVINE E. UNGERMAN,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

We hereby certify that the foregoing petition for rehearing of the above cause is presented to the Court in good faith, and not for purpose of delay.

LESLIE L. CONNER,
IRVINE E. UNGERMAN,
Counsel for Petitioner.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING.

I.

The fundamental difference between American democracy and the European dictatorships lies in a living Bill of Rights—the reservation to the citizen of certain rights and liberties as against his government. Our "forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance."[1]

From the earliest day to yesteryear this Court has steadfastly reaffirmed that it does not admit of the necessity of permitting police officers of the Federal government to search for evidence for the conviction of the citizen without the judicial safeguard of a warrant obtained from a magistrate upon a showing of "probable cause"; and if, as in the case of a moving vehicle, time does not permit of the obtaining of such a warrant, then to proceed without warrant but upon "probable cause".

We respectfully submit that the holding of the Court's opinion tends to destroy and make meaningless the fundamental requirement of "probable cause"; that it places this Court's mark of approval on the vicious practice of Federal Agents in lying-in-wait on all roads leading into Oklahoma and indiscriminately stopping to search for evidence of liquor law violation all automobiles which they *suspicion* of carrying liquor or which are driven by persons whom they suspicion are engaged in the illegal transportation of tax-paid liquors.

1. *United States* v. *Di Re*, 332 U. S. 581.

II.

We fully appreciate the reluctance of this Court to re-examine matters which have been thoroughly argued and supposedly closed by the writing of an opinion. The Brinegar opinion on its face discloses a most intensive analysis and learned research by the Court. We know that the issues involved were considered by this Court at great length; and it is evident from the most persuasive dissenting opinion of Mr. Justice JACKSON that questions of "policy" were ably presented to the majority of the Court and fully debated.

We are in agreement with the statement of *the law* as set forth in the Court's opinion:

> "But one who *recently* and *repeatedly* has given *substantial* ground for believing that he is engaging in the forbidden transportation *in the area of his usual operations* has no such immunity, if the officer who intercepts him *in that region knows* that fact at the time he makes the interception and the circumstances under which it is made are not such as to indicate the suspect is going about legitimate affairs." (Opinion, p. 17, emphasis ours.)

But we respectfully urge that *under the very test of the opinion* the Record and the evidence is clear and undisputed that Brinegar *had not recently* nor *repeatedly* given any substantial ground for believing that he was engaging in illegal transportation; that he *was not* operating *"in the area of his usual operations"*; that Malsed *did not* arrest him "in that region" and did not know he had moved to Vinita, Oklahoma; that there were absolutely *no* physical facts or circumstances which would indicate that the suspect was not proceeding about his legitimate affairs; that the inferences drawn by the opinion to the contrary are

wholly without support in this Record; that under the test of the opinion the finding of the trial court and the Circuit Court of Appeals that the search and resultant seizure here involved were undertaken wholly without probable cause is compelled by the facts of record.

We respectfully ask the Court's indulgence briefly to review the Record evidence. The Court, we respectfully submit, has gone beyond the Record in this case and has bottomed its conclusion on assumptions of material evidentiary facts which at trial were ruled by the Court and accepted by the parties as established to the contrary and concerning which defendant was denied the right of cross-examination of government's witnesses; and is now denied the opportunity to disprove in fact the error of the assumptions made by this Court and inferences set forth in the opinion.

If we correctly understand the opinion, the Court's conclusion is based upon the following: That "Malsed had arrested him (Brinegar) about five months earlier *for illegally transporting* liquor" (opinion, p. 2); that "* * * they recognized both the driver and the car from *recent* personal contact and observation, as having *been lately engaged in illicit liquor dealings.*" (opinion, p. 6); "And several months prior to the search he had arrested Brinegar for unlawful transportation of liquor and this arrest had resulted in an indictment which was pending at the time of trial" (opinion, p. 10). Added to this was the general locale of the setting and the additional fact that both the agents testified that "the car, but not especially its rear end, appeared to be 'heavily loaded' and 'weighted down with something'." (Opinion, p. 2.)

Correctly the Court points out, and we agree, that: "The troublesome line posed by the facts in the *Carroll*

case and this case is one between mere suspicion and probable cause." (Opinion, p. 16)

If ever there was a case in which the action of the agents was based solely upon "suspicion," we respectfully submit, this is it. We earnestly and respectfully submit that the inferences upon which the Court bases its conclusion are contrary to or without support of the Record.

On direct examination the witness Malsed testified that the Brinegar car "was loaded." (R. 8). On cross-examination of this witness counsel for petitioner proceeded to cross-examine as to the *physical basis for such "observation."* He established that "the liquor was in the center of the car and not in the turtle back; that the weight would be in the center of the car"; that not more than 500 or 600 pounds of weight were being carried *so that as matter of physical fact the appearance of the car gave no possible indication of violation of law to the officer* which would constitute probable cause, when he was interrupted by the Court (R. 9):

> "The Court: Well, Mr. Simms, this witness had not testified that the springs were sagging or anything of that sort. *I don't think his testimony tends to indicate that the car had such appearance as to afford probable cause.* He just said it appeared to be heavily loaded.
>
> Mr. Simms: Heavily loaded. And that is what I was——
>
> The Court: Well, that is not enough in my judgment *unless you can describe more particularly, the appearance which would constitute probable cause.* I am going to assume that the appearance of the car based on his statement that it was heavily loaded, is not enough to constitute probable cause." (R. 9) (Emphasis ours.)

Upon such ruling from the Court, counsel properly desisted from further cross-examination on this subject. *For the purpose of trial this was an established fact.* The government *did not come forward with any further or additional proof or testimony!* Under that state of the record it must be assumed, in fairness and justice, that the Government had no further testimony and that there was no physical basis to show that the appearance of the car would constitute probable cause. The assumption of a directly contrary fact by this Court, we respectfully submit, deprives petitioner of a fundamental right of trial. In a case so close as this case admittedly is, the fact that the car appeared to be "heavily loaded" is too material an element of "probable cause" to disregard.

Identically the same situation exists are regards the testimony of Investigator Creehan: He testified that the car appeared to be "weighted with something." (R. 11) Counsel for defendant again proceeded to show upon cross-examination that there was in fact no physical basis for such conclusion and that it could not constitute "probable cause" when again the Court interrupted:

> "The Court: The witness has already stated *there was no appearance in the rear that indicated—that the car was heavily loaded.* Usually the testimony is that the springs were sagging and so on, but we don't have that in this case." (R. 12)

III.

Other matters of material importance, such as geography, availability of liquor supply, proximity of Joplin, Missouri, to Vinita, Oklahoma, probability of violation, etc., are all noted by the opinion outside the Record. While we recognize the authority of the Court to do so and we

appreciate that the justices of this Court are men of wide experience and great learning we feel constrained respectfully to point out to the Court the danger and the fallacy into which such an excursion leads.

The opinion lays great stress upon the fact that "Malsed had arrested him (Brinegar) about five months earlier for illegally transporting liquor; had seen him loading liquor into a car or truck in Joplin, Missouri, on at least two occasions *during* the preceding six months." (Opinion, p. 2.) We respectfully submit that the statement is not supported by the Record. Malsed's testimony is clear and certain: He had seen Brinegar only *twice previously;* on September 23, and September 30, 1946. On both occasions Brinegar was gathering up liquor *in a truck.* September 30, 1946, is the date of the *first arrest.* The testimony is clear that this is the only time he saw Brinegar and *that he had not seen him at all during* the period from September 30, 1946, and the date of this arrest, March 3, 1947. (R. 16)

Additionally the opinion lays great emphasis on the first arrest because the Court finds that Malsed had arrested Brinegar for "unlawful transportation of liquor." *But what does not appear of record is the fact that Brinegar was on the trial of this charge of alleged unlawful transportation by the Court acquitted and found not guilty of unlawful transportation of liquor.* That arrest was not, as seems to be inferred by the opinion, an arrest under the same conditions and circumstances as are here involved. That arrest was made in *Missouri* and not in Oklahoma. It was made in a "wet" state—not a "dry" one. The only point in common between the two is that Malsed made both arrests purely upon suspicion. It is the very type of action against which we earnestly protest. That case (which was pending at the time of trial) was tried before Hon. ALBERT

A. Ridge, United States District Judge, sitting at Joplin, Missouri, and on motion for judgment of acquittal the Court discharged the defendant. In this connection we believe it important to note that Brinegar has no criminal record—and had none at the time here involved.

IV.

That judgment of acquittal further points up, we respectfully submit, the significance of the distinction urged upon this Court and which the opinion rejects: That the loading of liquor by Brinegar in Joplin, Missouri, in *September, 1946, cannot* under any circumstances reasonably give rise to a belief of a *prudent and cautious man* that violation was occurring when Malsed saw Brinegar on *March 3, 1947*. It is a most dangerous and unwarranted principle, we respectfully submit, to allow an inference of illegality to flow from the doing of a perfectly legal act.

Perhaps it is because the trial judge and the judges of the Circuit Court of Appeals were familiar with the fact that daily hundreds of good Oklahoma citizens "load up" whiskey at Joplin, Missouri, and other points for their own personal use and pleasure and that such fact is "common knowledge" in Oklahoma that they refused to draw the inferences and conclusions from such conduct which this Court so readily assumes. Perhaps it was the knowledge of the *local situation* which these judges had which made it so completely unreasonable to them to compare the situation here involved with the circumstances of the *Carroll* case that they did not deem the *Carroll* case in point on the facts. Perhaps it was their knowledge that the fact of the purchase of liquor in Joplin by an Oklahoma citizen *does not* in any manner indicate that the person is engaged in the illicit liquor business. Whatever be the reason, the proof

is now positive that such acts committed on September 23 and September 30th, 1946, and the "transportation" for which Brinegar was arrested on September 30th were *in fact* perfectly legal acts which cannot and should not furnish any basis for probable cause such as would remove the mantle of the Fourth Amendment from about the citizen.

V.

If Brinegar had in fact been prior to this time transporting liquor *into Oklahoma* that fact was wholly and completely unknown to the Federal Agents. Creehan did not even know him. Malsed certainly had neither knowledge nor any cause for such belief. In September, 1946, when Malsed *last saw* Brinegar prior to this arrest, Brinegar lived in Hiwasse, Arkansas. Arkansas is a "wet" state. He had a farm there. (R. 29) He did *not* live in Vinita, Oklahoma, during all this period of time. (R. 30). He had been living in Vinita only a short time. *Malsed had no knowledge* that he had moved or that he was going to Vinita. The second question which he propounded to Brinegar was: "I asked him if he was going to Hiwasse with the liquor, and he said, no, he was going to Vinita this time." (R. 19)

We respectfully disagree for the reasons above stated in paragraphs II, III, IV and V that the evidence is clear and undisputed that the agent had good ground for believing that Brinegar *was engaged regularly throughout the period in illicit liquor running and dealing.* There is nowhere in the record, we seriously and most respectfully submit, an iota of evidence upon which an inference may be drawn that Brinegar at any time dealt in liquor. We respectfully submit the inferences of the opinion are in error and are not supported by the Record.

VI.

As we read the opinion there is still required something more than mere suspicion to justify a search; probable cause requires that "the facts and circumstances within their knowledge, and of which they had reasonably trustworthy information, (be) sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is then being committed. (Opinion, pp. 15-16.)

Although the opinion brushes aside the findings of the District Court and the conclusions of the Court of Appeals that probable cause did not exist when the Federal officers commenced their search as being "erroneous," we respectfully submit that they cannot be so summarily dismissed. The test is: Did the officers act on suspicion that Brinegar was then carrying liquor or did they, acting as reasonably cautious and prudent men, have sufficient information to reasonably warrant a belief that an offense was then being committed.

On the facts of this case Hon. Royce H. Savage, a most learned and extremely able trial judge, and Judges Phillips, Huxman and Murrah, the learned judges of the Circuit Court of Appeals for the Tenth Circuit, were all of the opinion that probable cause did not exist.

This Court in its opinion notes the complete absence of citation of the *Carroll* case in the opinions of the trial court and the Court of Appeals and leaves the implication that the *Carroll* case was overlooked and not considered below. This is error. The *Carroll* case was cited to the Court by both the appellant and the government, argued to it and was considered by it. The identical argument which was made by the government in its brief in this Court was

substantially advanced by the government in its brief and argument before the Circuit Court of Appeals.[2]

We deem it as important here that the lower courts expressly found that there was *no probable cause*, as the Court did in the *Carroll* case that the lower court found that there *was probable cause*. The judges below and each of them, who are thoroughly acquainted with the locale, the local circumstances and the inferences reasonably to be drawn therefrom, who try and review scores of these cases annually, felt, understood and knew that the facts within the knowledge of the investigators were as a matter of fact, insufficient to constitute probable cause.

VII.

The learned trial judge prophetically foresaw and correctly analyzed the effect of a holding of the presence of probable cause under the circumstances of this case: "To so hold would in effect be to say to the officers that they may just make a search of the automobiles of known bootleggers on sight; that is about what it would amount to in my judgment." (R. 12) That is exactly what the opinion does. It completely withdraws from "known bootleggers" or anyone whom the Agents may reasonably suspect the protection of the Fourth Amendment. The police officer himself can now determine the incidence of the Amendment and himself provide probable cause by "knowing" that the per-

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2. Brief of Appellee, United States Circuit Court of Appeals, 10th Circuit, No. 3518, *Virgil T. Brinegar, Appellant, v. United States of America, Appellee*, pages 5 and 6; the same argument was made at trial (R., p. 12).

See also, dissenting opinion of HUXMAN, J. (R., p. 42): "That they would have searched his car in any event is borne out by the position the Government takes in this appeal, that the condition of the car at the time they first observed it, plus the fact that Brinegar had the reputation with the Alcohol Tax Unit Agents of dealing in liquor, constituted probable cause warranting a search without a warrant."

son whose car he desires to search is a bootlegger or has a reputation of being engaged in illegally transporting liquor. There is no longer any valid check. We respectfully ask the Court to take notice of the fact that all bootleggers' cars look heavily loaded to an A. T. U. agent at all times, whether in fact, there is any physical basis or not. This is an optical impairment acquired from the exigencies of his trade. Whenever, therefore, he sees and recognizes a bootlegger he automatically has probable cause to search his car.

We respectfully protest such result. We believe it is an *extension* of the *Carroll* case and not an application of its principle. If the lack of "knowledge" on the part of the Agents may be affirmatively proved, we respectfully request that the case be remanded with proper directions so that we can demonstrate to the Court clearly and conclusively that which we, the trial court and the judges of the Court of Appeals erroneously believed to be obvious—that without question, under the rule of the *Carroll* case, and under the test provided by the Court's opinion the search here involved commenced upon mere suspicion and not upon probable cause.

VIII.

We most respectfully urge that the Court lend further ear to the warnings sounded by the dissenting opinion of Mr. Justice JACKSON. He has better and more ably presented the matter than have counsel for petitioner. Perhaps we have helped to point out that the distinctions which he draws are valid, both legally and factually. "* * * we must remember that the authority which we (the Court) concede to conduct searches and seizures without warrants may be exercised by the most unfit and ruthless officers as well as by the fit and responsible, and resorted to in case of petty misdemeanors as well as in the case of the gravest

felonies * * * We must remember (too) that the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit." (Justice JACKSON, Dissenting Opinion, p. 3.)

No difficulty of rule or practice or procedure ought to prevent the completion of the record in this case and a full reconsideration of the matter by this Court. In the interests of justice to the petitioner and the safeguarding of the fundamental rights of the citizens of these United States we respectfully pray that a rehearing be granted.

LESLIE L. CONNER,
IRVINE E. UNGERMAN,
Counsel for Petitioner.

CHARLES A. WHITEBOOK,
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